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SUPREME COURT OF APPEALS OF VIRGINIA.

AMERICAN SURETY CO. OF NEW YORK v. COMMONWEALTH.*

June 16, 1904.

CORPORATIONS—CHARTER FEE—LICENSE—STATUTES—CONSTRUCTION—CORPORATIONS EXEMPT FROM OBLIGATION OF STATUTE.

1. Code 1887, section 1104, as amended by Act May 15, 1903, providing that a corporation which has already paid a fee or tax for authority to transact business in the State shall not again be liable for such fee before securing a license from the State Corporation Commission, contemplates the charter fee required by Acts 1902-1904, p. 360, and does not refer to the annual license tax.
2. Const. art. 12, section 156a, provides that, subject to the provisions of the Constitution, and to such regulations as may be prescribed by law, the State Corporation Commission shall be the department of government through which all licenses to foreign corporations shall issue, and through which shall be carried out all the provisions of the Constitution for the regulation and control of such corporations. Code 1887, section 1104, as amended by Acts 1902-1904, p. 360, provides that every incorporated company doing business in the State must pay a charter fee. *Held*, that every corporation which has not paid a fee is required to do so, all prior enactments relieving any corporation or class of corporations from the payment of the fee being repealed.

Appeal from State Corporation Commission.

Appeal by the American Surety Company of New York from a decision of the State Corporation Commission imposing a fine on appellant for transacting business without having obtained the license required by law. *Affirmed.*

Wyndham R. Meredith, for appellant.

The Attorney General and *William A. Anderson,* for the Commonwealth.

KEITH, P.

This is an appeal from a decision of the State Corporation Commission imposing a fine upon appellant for transacting business in the State of Virginia without having obtained a license in accordance with section 1104 of the Code of 1887, as amended by an Act of Assembly approved May 15, 1903. That section provides that

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"every incorporated company doing business in this State shall have an office in the State, at which all claims against such company due residents of the State may be audited, settled and paid. Every such company incorporated under a jurisdiction beyond the limits of this State (and hereinafter designated as a foreign corporation) shall, before doing business in this State, present to the State Corporation Commission (a) a written power of attorney, executed in duplicate, appointing some person residing in this State its agent, upon whom all legal process against the corporation may be served, and who shall be authorized to enter an appearance in its behalf; (b) two duly authenticated copies of the charter of the corporation, and (c) a certificate of the Auditor of Public Accounts, showing the payment into the treasury of the fee required by law to be paid by such corporation; and shall obtain from said Corporation Commission a license to transact business in the State. If it shall be made to appear to the State Corporation Commission that said corporation has complied with the law relative to the licensing of a foreign corporation of the character of the applicant corporation, then said Corporation Commission shall issue to said corporation a license to transact business in the State." There are other provisions of this section which need not be, at present, adverted to.

This law is broad and comprehensive in its terms. It applies to every incorporated company doing business in the State, and, upon its face, embraces foreign as well as domestic corporations.

The appellant, having been served with notice by the State Corporation Commission to appear and show cause why a fine should not be imposed upon it for doing business without having complied with the section just quoted, appeared and answered, resting its defense upon two grounds: First, that sections 1104 and 1105, as amended, were not intended to apply to it, but that it was governed by a special law, found, as originally passed, in Acts 1893-94, pp. 758, 764, cc. 661, 662, and amended at the session of 1895-96 (Acts 1895-96, pp. 284, 423, cc. 248, 406); and, second, that it had tendered to the Auditor the specific license tax of $200 imposed upon it for the year 1904, and that section 1104 has reference to this license fee, and not to the charter fee required in sections 37-40, inclusive, found at pages 178-180, Acts Assem. 1902-1904; and, further, that, even though a charter fee was by law required of it, it comes within the exception found in section 40, *supra,* which provides that "nothing contained in this section, or

the three preceding sections, shall be construed to impose a fee for a charter or for authority to transact business in this State, upon any company which has already paid the fee or tax heretofore imposed by law upon its charter or for authority to transact its business in this State."

Dealing with the last defense first, it seems clear that the fee required by section 1104 is what is known as a "charter fee." This appears from the concluding portion of that section: "Any foreign corporation which has heretofore paid the fee required by law to entitle it to transact business in this State, and has otherwise complied with the laws heretofore existing relative thereto, shall not, on application for license to transact business in this State, be required to pay such fee again, nor to file a copy of the charter with the Secretary of the Commonwealth, if a copy thereof is already on file in his office." It seems too plain for argument that this has reference to a charge which is paid once for all, and not to the license tax which is paid each and every year. Nor does the appellant, in any event, come within the exception, for it nowhere appears that it has at any time paid this charter fee. Its statement upon this subject is cautiously made. Referring to section 1104, as amended, appellant says in its petition to the Corporation Commission for license to do business in the State for the year 1904 that "it only required those foreign corporations which have always been governed by section 1104 to pay the charter fee where such corporations are attempting to do business without ever complying with that section, or with the law relating to charter fees. All such foreign corporations are by the Act of May 15, 1903, required to now pay this charter fee. The Act leaves untouched that class of foreign corporations which were not governed by section 1104, as is the case with surety companies, and your petitioner in particular. In other words, if a right to transact business in this State has once been granted on the payment of a charter fee and an annual license tax, or on the payment of a license tax only, the State cannot, or at least doesn't intend to, now attach the requirement of the payment of a charter fee to the foreign corporation which has already obtained and been granted the right to do business in this State." This is certainly not an averment that it had paid the charter fee. Its whole insistence, indeed, is that it was never liable for the charter fee, but that it had been permitted to do business without the payment of such fee, and was therefore entitled to continue its

business upon the same terms. There is neither allegation nor proof of the payment of the charter fee, and therefore appellant is not within the terms of the exception to the operation of sections 37-40.

The case of appellant must stand or fall by its first contention. Is it controlled by the law applicable to corporations in general, whether foreign or domestic, or is there a special law which applies to that particular class of corporations to which appellant belongs?

The Constitution of Virginia (section 156a, art. 12) provides that, "subject to the provisions of this Constitution and to such requirements, rules and regulations as may be prescribed by law, the State Corporation Commission shall be the department of government through which shall be issued all charters and amendments or extensions thereof, for domestic corporations, and all licenses to do business in this State to foreign corporations; and through which shall be carried out all the provisions of this Constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this State." By section 1104, as found in the Acts of 1902-1904, at page 360, and which has already been quoted, every incorporated company doing business in this State is required to pay a charter fee. The amount of that charter fee is fixed by sections 37-40, already referred to, and the penalty for doing business without complying with the law is imposed by section 1105.

Whatever may have been the interpretation of the law as it existed before the adoption of the Constitution now in force, and the passage of the laws in pursuance thereof, including section 1104 as amended, there seems no room for question that appellant, in common with every incorporated company doing business in this State, must pay a charter fee, or bring itself within the operation of the exception. It would serve no useful purpose to inquire whether by a true construction of the statutes upon the subject in force prior to the adoption of the Constitution, the appellant was liable to pay the tax, and escaped by the oversight or inadvertence of those charged with the execution of the laws, or whether the legislature had seen fit to place such companies upon a more favorable footing than all other corporations doing business in the State, for, whether this company has hitherto escaped by inadvertence, or in accordance with the intent of the legislature, there is nothing in the nature of a contract, nothing in the nature of an estoppel upon the State to

interfere with its unquestioned power of taxation. Therefore, whatever opinion might be entertained with reference to the laws as they heretofore existed, the Constitution and laws as they now stand unmistakably place all corporations upon a footing of equality, and all are required to pay a charter fee as the condition precedent to doing business in this State, with a proviso that this charter fee shall not be exacted of those corporations by which this fee has been at any time paid. The Corporation Commission, which is the department specially charged with the duty of granting licenses to do business in this State to foreign corporations, has given this matter careful consideration; has found that the laws do not discriminate in favor of appellant; that it is not within any exception; that it was doing business in violation of the law; and has imposed upon it the minimum penalty for its offense. We discover no error in its ruling, and it is, therefore, affirmed.

HORTENSTINE v. VIRGINIA-CAROLINA RY. CO.*

Supreme Court of Appeals.

June 23, 1904.

RAILROADS—INJURY TO TRESPASSER—NEGLIGENCE—PLEADING—RATE OF SPEED—SIGNALS.

1. A declaration for injuries caused by the negligence of the defendant must show that from the relation existing between the plaintiff and defendant a legal duty was owing from the latter to the former, the failure to discharge which caused the injury.
2. In an action by trespasser upon a railroad track to recover for injuries, the declaration must aver that after the railroad company discovered his peril it could, in the exercise of ordinary care, have avoided injury to him.
3. A railroad company owes to trespassers and licensees no duty of providing reasonably safe and proper appliances.
4. A railroad company owes to a trespasser upon its track no duty in regard to the rate of speed or schedule time upon which it shall run its trains.
5. Section 2900, of the Code of 1887, preserving to any person injured by a violation of the statute the right to maintain an action for injury, was designed only to preserve such right where it existed at common law, and not to give a right of action where none existed.

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